

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

Marie Llanos Flickinger
3737 Spring Hill Dr
Middleton WI 53562

Complainant

vs.

Wisconsin Women's Business Initiative
Corporation
2745 N MLK Jr. Dr.
Milwaukee WI 53212

Respondent

HEARING EXAMINER'S
RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20142060

EEOC CASE NO. 2B201400032

On May 5, 2015, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in the Civil Rights Office at 215 Martin Luther King, Jr. Boulevard. The Complainant, Marie Llanos Flickinger, appeared in person and by her attorneys The Jeff Scott Olson Law Firm by Jeff Scott Olson. The Respondent, Wisconsin Women's Business Initiative Corporation, appeared by its attorneys Foley & Lardner, LLP by Katherine D. Spitz. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. Complainant, Marie D. Llanos Flickinger, is a Hispanic female with her date of birth being June 15, 1947.
2. Complainant was born in Chillan, Chile, and, at various points in her career, has worked between Chile and the United States including in Madison and Milwaukee.
3. Complainant is fluent in English and Spanish.
4. Respondent, Wisconsin Women's Business Initiative Corporation ("WWBIC"), is a non-profit economic development corporation, with offices at 2300 South Park Street, Suite 103, in the City of Madison, Dane County, Wisconsin and employs 15 or more employees.
5. Complainant applied for a Regional Director position for the Madison location of WWBIC on June 21, 2013.

6. Complainant participated in a first and second round of interviews for the Regional Director position for the Madison location of WWBIC on July 8, 2013 and July 11, 2013, respectively.
7. Complainant received an email from WWBIC on July 15, 2013 informing her that she had not moved on to the next step in the review/hiring process.
8. Mara Henningsen is the Vice President of Client Programs and Services with WWBIC.
9. Mara Henningsen is a Caucasian female, age 39 at the time of hearing.
10. Amber Miller is the Regional Director for WWBIC's Milwaukee location.
11. Amber Miller is a Caucasian female, age 35 at the time of hearing.
12. Heather Lux is the Regional Director for WWBIC's Kenosha location.
13. Heather Lux is a Caucasian female, age 51 at the time of hearing.
14. Alice Schmatzhagen is the Human Resources Director for WWBIC.
15. Alice Schmatzhagen is a 73 year old female.
16. 72 individuals applied for the Regional Director position for the south central location of WWBIC.
17. Of those 72 individuals, 12 individuals were selected for the first round interview process with WWBIC.
18. Of those 12 individuals, 6 individuals were selected for the second round interview process with WWBIC.
19. The subject Regional Director position had a starting salary of \$55,000.00 per year, plus benefits.
20. The requirements for the Regional Director position listed in February 2013 with WWBIC included a minimum of five years' experience in economic development or private sector business, a bachelor's degree, direct program management and supervisory experience, and the ability to work effectively and collaboratively with diverse audiences.
21. Mara Henningsen conducted the Complainant's first round interview, via Skype, on July 8, 2013.
22. Amber Miller and Heather Lux conducted Complainant's second round interview, in person, in the Madison WWBIC office, on July 11, 2013.
23. Ms. Henningsen, Ms. Miller, and Ms. Lux met and conferred following the second round of interviews on the relative merits of the candidates.

24. Following the meeting between Ms. Henningsen, Ms. Miller and Ms. Lux, the field of 6 candidates was narrowed to 3.
25. Ms. Henningsen, Ms. Miller, and Ms. Lux all indicated that interview notes were taken, however, none were produced or offered into evidence.
26. Ms. Henningsen ultimately determined who would be hired for the Madison Regional Director position.
27. The Respondent ultimately hired Deborah Ellis-Brock, a 41 year old Caucasian female.
28. Deborah Ellis-Brock had been working for WWBIC since June 2013 at the time she was hired as the Regional Director.
29. Deborah Ellis-Brock did not obtain a bachelor's degree until December 2013. The requirements for the Regional Director position included having a college or university degree.
30. Complainant had completed a BS program with the University of Wisconsin and a MBA program with the University of Chicago prior to applying for the WWBIC position.
31. At the time of hearing, WWBIC employed 48 full time employees. Approximately 60% of those employees were women, approximately 27% identified as a minority, 23 of those individuals were over the age of 40, and two individuals were over the age of 60. There is no indication that Ms. Henningsen hired any of those individuals.
32. The Complainant had extensive program management experience working for Constructora Orlando Munoz/Alcorp, Ltd. in Chile and in several other positions in Wisconsin.
33. Deborah Ellis-Brock had approximately one to two months program management experience working for WWBIC.
34. The Complainant had a lengthy history of connections in southern Wisconsin including her work with the Second Harvest Food Bank of South Central Wisconsin, La Causa, and through many different volunteer positions. These contacts and connections permitted the Complainant to successfully grow the staff and budgets of several programs and included relationships with Boards of Directors, funding sources, financial institutions, and the supervision of staff and volunteers.
35. Deborah Ellis-Brock lacked a similar history of experience or local contacts beyond those with the WWBIC as a volunteer.
36. The Complainant states that during her interview with Ms. Henningsen, Ms. Henningsen asked the Complainant how long she would work in the Regional Director position. Ms. Henningsen denies having made this remark.

37. In its initial response to an Investigative Questionnaire sent by the Department of Civil Rights, WWBIC stated that the reasons for not moving the Complainant to the final interview stage were a lack of program management experience and a lack of local contacts and connections. The WWBIC did not indicate that the Complainant had interviewed poorly.
38. Ms. Henningsen, Ms. Miller and Ms. Lux all testified that the reason for not forwarding the Complainant to the final interview stage was that the Complainant did not interview well and seemed to be unable to answer questions directly.
39. It does not appear that Ms. Henningsen, Ms. Miller and Ms. Lux utilized standard questions and to the extent they took notes, they did not present them at the time of hearing. Ms. Henningsen, Ms. Miller and Ms. Lux were unable to recall any of the questions they asked the Complainant or other candidates in their interviews and were unable to give examples of the Complainant's failure to answer the questions that were asked.
40. Deborah Ellis-Brock is approximately 25 years younger than the Complainant, is roughly the same age as Ms. Henningsen and Ms. Miller, and is approximately 10 years younger than Ms. Lux.
41. Ms. Henningsen, Ms. Miller and Ms. Lux were unable to repeat the questions asked of Deborah Ellis-Brock or the specifics of any of Ms. Ellis-Brock's answers.
42. Subsequent to her not being selected for the Regional Director position, the Complainant sought employment by responding to various advertisements. While seeking alternative employment, the Complainant continued her work in consulting and training. The Complainant did not reapply for the Regional Director position after it became open again, because she did not see any announcement for the opening.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class Age and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.
2. The Complainant is a member of the protected class Race and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.
3. The Respondent is an employer within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.
4. The Respondent did discriminate against the Complainant on the basis of her age in violation of the Equal Opportunities Ordinance by failing to hire the Complainant.
5. The Respondent did not discriminate against the Complainant on the basis of her race in violation of the Equal Opportunities Ordinance by failing to hire the Complainant.

6. The Complainant reasonably attempted to mitigate her damages by seeking other employment after being eliminated from the hiring process.
7. The Respondent failed to demonstrate a lack of reasonable mitigation of her damages on the part of the Complainant.

ORDER

1. The claim of discrimination on the basis of race is dismissed.
2. The parties shall confer no later than 30 days from this Order's becoming final, to establish an amount of damages owed to the Complainant as a result of the Respondent's discrimination against the Complainant on the basis of her age. Damages shall, at a minimum, include back pay, pre-judgment interest and the Complainant's reasonable costs and fees in pursuit of this complaint including a reasonable attorney's fee.
3. Should the parties be unable to agree upon an amount of damages, they shall inform the Hearing Examiner of such inability and the Hearing Examiner will hold further proceedings and shall make an award that will make the Complainant whole.
4. If the parties have not been able to reach an agreement on damages, the Complainant shall submit a petition for her reasonable costs and fees including a reasonable attorney's fee not later than 15 days from the Hearing Examiner's decision on damages becoming final.

MEMORANDUM DECISION

The record in this matter demonstrates an unusually marked difference in how the parties see the record and the law that is applicable to this dispute. The Hearing Examiner sets forth his views and understanding of the facts and law below.

The Complainant alleges that the Respondent discriminated against her on the bases of her age (date of birth 6/15/47) and her race (Hispanic) when the Respondent failed to hire her for the position of Madison Regional Project Director. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination had occurred in regard to the terms and conditions of employment (failure to hire) because of the Complainant's age (66) and race (Hispanic).

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine, for each allegation of discrimination, if the Complainant has established a *prima facie* claim of discrimination. A complaint for discrimination on the basis of age or race must meet the *prima facie* standard; that is, the Complainant must establish that she is 1) a member of the protected class as defined by the Madison General Ordinance Sec. 39.03, 2) that she applied, and was qualified for, an available job opening, 3) that she suffered an adverse employment action, and 4) that there is a causal connection between the Complainant's membership in her protected class(es) and the adverse action suffered. The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence, or, by the greater weight of the credible evidence.

Presuming the Complainant meets this burden of proof, the burden then shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if she can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive.

In her initial brief, the Complainant suggests a slightly different formulation of the *prima facie* claim for, particularly, her claim of age discrimination. "The currently accepted formulation is this: In order to make out a *prima facie* indirect case of unlawful discrimination, a plaintiff must establish that 1) she is a member of a protected class; 2) she applied for, and was qualified for, an open position; 3) she was rejected; and 4) the employer filled the position with a person not in the plaintiff's protected class, or the position remained open. Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999)." While the suggested formulation is couched in somewhat different terms, the Hearing Examiner remains comfortable with his general formulation of the *prima facie* standard. The Hearing Examiner accepts that the *prima facie* standard is subject to modification and adjustment depending upon the nature of the claim and the Hearing Examiner does make such adjustments.

First, the Hearing Examiner will determine whether the Complainant has demonstrated that she has met the first element of the *prima facie* claim. In doing so, the Hearing Examiner will address each claim separately. The Complainant filed a complaint of discrimination (age and race) in relation to the terms and conditions of employment (failure to hire) against the Respondent on April 11, 2014. Complainant is a member of the protected class Age as defined in Madison General Ordinance Sec. 39.03(2). Complainant's date of birth is June 15, 1947, thus the Complainant meets the first element of the *prima facie* claim.

Next, the Hearing Examiner must examine whether the Complainant has established that she had applied for, and was qualified for, a job opening with the Respondent. The Complainant discovered a job opening for a Regional Project Director with the Respondent through an online search. Complainant reached out to the Respondent to inquire as to whether the position had been filled. She was informed that it had not been, and was encouraged to submit her resume and salary requirements. The Complainant did submit the requested information, and was subsequently emailed a questionnaire to complete and return for further consideration. Following completion of this questionnaire, the Complainant was invited to participate in a first interview. The Complainant subsequently moved on to a second round of

interviews with the Respondent. The movement of the Complainant through the interview process suggests that the Complainant was qualified for the position that she sought. Beyond the transactional basis for finding that the Complainant was qualified for the Respondent's position, the record unquestionably establishes that the Complainant possessed the type of experience and the general credentials to qualify her for the Regional Director - Project Manager position with the Respondent. Specifically, her experiences in fund raising and growing two programs in Wisconsin including Second Harvest in the general Madison area, her employment with La Causa, Inc. in Milwaukee, along with her employment in Chile, demonstrate that the Complainant was at least as qualified for the position as the successful candidate if not more so. The Complainant has met the second element of establishing a *prima facie* claim.

The Hearing Examiner now turns to whether or not the Complainant suffered an adverse employment action. It is clear from the record that Complainant was not offered employment with the Respondent, establishing the third element of Complainant's *prima facie* claim.

Finally, the Hearing Examiner approaches the issue of whether or not there was a causal link between the Complainant's membership in a protected class and the Respondent's failure to hire her. One way of establishing this link is to examine whether the candidate hired was either someone less qualified, someone not within the protected class, or that the employer treated a similarly situated candidate not in the protected class more favorably.

The Respondent, Wisconsin Women's Business Initiative Corporation ("WWBIC") is a statewide non-profit economic development corporation, providing business services and education to traditionally underserved members of society. On June 18, 2013 Complainant emailed Human Resource Director, Alice Schmatzhagen, regarding a job advertisement for a Regional Director position she had seen with WWBIC. Ms. Schmatzhagen indicated that if the Complainant were interested in the position, she should forward a cover letter, resume and salary requirements for consideration. The Complainant forwarded the requested information on June 21, 2013. She was then emailed a questionnaire, which she completed and returned to the Respondent. Mara Henningsen, Vice President of Client Programs and Services for the Respondent, testified that there were 72 individuals that had applied for the Regional Director position. Of those 72 individuals, 12 (including the Complainant) were selected for first round interviews, and of those 12 first round interview individuals, the field was narrowed to 6 individuals for second round interviews (again, including the Complainant).

The Complainant's first interview was with Mara Henningsen (female/Caucasian/age 39). This interview took place via Skype. While the Complainant indicated that Ms. Henningsen was pleasant and courteous, she did not seem engaged during the interview. The Complainant testified that during this interview Ms. Henningsen asked how long she would be able to remain in the regional director position, should she be offered the job, to which the Complainant replied she would stay as long as she was useful to the organization. In her testimony, Ms. Henningsen denied asking this question. The Complainant indicated that, throughout the interview, Ms. Henningsen seemed hesitant or not eager to share details of the organizational operation of WWBIC and that she did not seem enthusiastic about the Complainant's candidacy. Ms. Henningsen's position within WWBIC served as the direct report for the three Regional Director positions in southern Wisconsin.

Following her initial interview, the Complainant was referred on for a second interview, which took place, in person, in the Respondent's Madison office. This interview was conducted by Amber Miller (female/Caucasian/age 35) and Heather Lux (female/Caucasian/age 51). The

Complainant again testified that both Ms. Miller and Ms. Lux seemed disinterested in the interview, that it was very, very brief, and felt more like a formality. During this interview, both Ms. Miller and Ms. Lux expressed a desire to just get back to Milwaukee. Ms. Miller testified that during the interview she found the Complainant to be very pleasant, professionally dressed and that she had enjoyed the Complainant's stories about her time in Chile. Ms. Lux testified that she thought the Complainant was pleasant. Both Ms. Miller and Ms. Lux, however, testified that they did not believe the Complainant to be a "good fit" for the position, that she lacked interpersonal skills, and that she had a difficult time expressing herself in a clear and concise manner.

After the first two rounds of interviews, Ms. Henningsen, Ms. Miller and Ms. Lux conferred as to who they thought might be the best candidate for the regional director position of the 6 remaining candidates, and narrowed the field to their top 3. The Complainant did not make it to this final round, as all three interview panelists agreed she wasn't the right fit and had difficulty with communicating directly. Ms. Henningsen made the ultimate determination who to hire.

Ms. Henningsen, Ms. Mills and Ms. Lux all testified that they took notes during their interviews of the Complainant, but at the time of hearing, those notes were not produced to corroborate their testimony. Additionally, the testimony as to whether the candidates were all asked the same questions so that the Complainant's responses could be measured against the other candidates was mixed. Whether there was such a template of questions, they were not produced by the Respondent during the hearing.

The Complainant asserts that the Respondent's failure to produce these documents during discovery should support a finding that those documents were adverse to the interests of the Respondent. The Hearing Examiner notes that the Complainant did not seek an Order to Compel the production of these documents. Such a request of the Hearing Examiner would normally be expected, and the failure to request the intervention of the Hearing Examiner undercuts the inference sought by the Complainant.

However, the Respondent's contention that Ms. Henningsen was confused by the Complainant's request for these documents simply is incredible to the Hearing Examiner. If the Respondent wishes the Hearing Examiner to find that Henningsen is a qualified, professional administrator, Henningsen's actions in failing to "understand" and to seek guidance of counsel, or to seek clarification from Complainant's counsel, strains the Hearing Examiner's credulity.

For the Respondent then to fail to produce these documents that any capable hiring authority would use and maintain casts substantial doubt as to the credibility of the Respondent's witnesses with respect to the content and accuracy of their testimony at hearing. In short, the Respondent's witnesses lack credibility in the mind of the Hearing Examiner with respect to their accounts of the interviews of the Complainant.

The witnesses' inability to recall the questions asked of the candidates including the Complainant and the answers given by the Complainant give the Hearing Examiner no faith in their credibility. The similarity in the testimony of the Respondent's witnesses both as to their vagueness and their uniformity relating to the Complainant's lack of clarity in the interview hint at witnesses who've met to keep their versions straight.

The Respondent ultimately hired Deborah Ellis-Brock (female/Caucasian/age 41), who was essentially promoted from within. Ms. Ellis-Brock had been working for the Respondent for approximately 1 ½ months at the time she was hired as the regional director.

Some of the requirements for the regional director position posted with the Respondent were, 1) a minimum of 5 years' experience in economic development, 2) a bachelor's degree, 3) direct program management and supervisory experience; and 4) strong and effective communication skills. The Complainant's resume is rife with economic development, program management and supervisory experience. Complainant holds BS and MBA degrees, and has assisted in growing non-profit and start-ups from low or no budget operations into multi-million dollar enterprises. Yet, the Respondent argues that this experience is not applicable to the regional director position with WWBIC. It is the Respondent's position that since much of the Complainant's success was "not tied to the Madison area" that it somehow does not speak to her ability to operate in program management or supervisory roles successfully. When pressed further on whether or not the Complainant's success during her three years with Second Harvest Food Bank in Madison, Wisconsin, and her year with La Causa in Milwaukee, Wisconsin, would apply to the program management and supervisory experience requirements, Respondent seemed to downplay the importance of these experiences. While the Hearing Examiner does not sit as a super Human Resources Manager, the Respondent's minimization of the Complainant's experience once again undercuts the credibility of Ms. Henningsen in particular. When questioned about Ms. Ellis-Brock's qualifications when compared with the Complainant, Ms. Henningsen was only able to offer fragile reasoning as to how Ms. Ellis-Brock's employment and educational experiences eclipsed those of the Complainant.

Based solely upon the requirements outlined above, it is hard for the Hearing Examiner to find a credible argument that the Complainant was not the more qualified candidate. The Complainant had an extensive background in economic development, program management, and supervisory experience. Her resume details multiple projects in which she was charged with raising funds or securing grants for a variety of initiatives and building and implementing various programs for a wide range of causes, with a proven record of growth and success. Ms. Henningsen testified that Ms. Ellis-Brock's approximately one month of project management consulting, along with various, vague, prior job duties met the requirements for the position. Ms. Henningsen could not point to specific supervisory experience in Ms. Ellis-Brock's work history, but recalled having had a conversation with Ms. Ellis-Brock in which she mentioned that she had supervised others in the past. The Complainant had two relevant degrees. Ms. Ellis-Brock was in the process of obtaining her bachelor's degree at the time she was interviewed and hired, but still had a semester left of school to complete. Despite the requirement of a degree, and Ms. Ellis-Brock's lack thereof, Ms. Henningsen testified that she viewed a degree as speaking more to a person's character than to their capabilities, and to a person's ability to see a goal through "the rigors of what a college education requires". While Ms. Henningsen's views on the relative merits of education might be interesting, possession of a collegiate degree is listed as a requirement for the position. For Ms. Henningsen to now attempt to say that that really wasn't a requirement asks the Hearing Examiner to find that there were no real requirements for the position and that the Respondent was free to hire anyone it wished for any reasons it wished. Such a position flies in the face of good personnel management practice.

All three interview panelists, Ms. Henningsen, Ms. Miller and Ms. Lux, expressed that they felt the Complainant's communications skills to be lacking, however, neither Ms. Miller nor Ms. Lux could recall specific questions that were asked in the interview about the important functions of the job or the Complainant's responses. Ms. Henningsen, Ms. Miller and Ms. Lux all

indicated that they didn't think the Complainant presented well, and that she was unable to directly answer a question. Realizing that a hearing and an interview are two different scenarios, the Hearing Examiner did not find this to be the case at the time of hearing. In fact, in order to have had the success realized in her prior employment, the Complainant would need to be an effective communicator in a wide variety of circumstances. This reasoning again feels like a thinly veiled attempt to disqualify the Complainant from the hiring process.

The above circumstances give rise to an inference of discrimination on the part of the Respondent with respect to the Complainant's claim of age discrimination. In addition, and perhaps more importantly, the difference in the ages of Ms. Ellis-Brock and the Complainant create a strong inference of discrimination. In Cronk v. Reynolds Transfer and Storage, MEOC Case No. 20022063 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006; Comm. Dec. 2/28/2005; Ex. Dec. 9/13/2004); Reynolds Transfer & Storage, Inc. v. City of Madison Department of Civil Rights, Equal Opportunities Commission, 2000 CV 1100 (Dane Cty. Cir. Ct. 10/19/2007), Judge Bartell wrote, "A significant age disparity is highly probative of discriminatory animus and can be used to state a *prima facie* case under the McDonnell Douglas methodology. See Robin v. Espo Engineering Corp., 200 F.3d 1081, 1090 (7th Cir. 2000) ("Accordingly, we require that Robin present the following... Espo hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age or disability was the reason for the discharge."); Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1178-79 (7th Cir. 1997) ("To stave off summary judgment, Coco had to show that he was performing up to the employer's legitimate expectations, and that he was replaced by a much younger person." (citations omitted)). Reynolds Transfer responds by arguing that the record shows that it did not seek out someone younger than Cronk, but instead hired a recruiter to refer candidates to it. However, the record indicates that Reynolds Transfer still retained the final hiring decisions over the people referred to it by the recruiter, and ultimately hired someone thirty-one years younger than Cronk. Based on this evidence, I conclude there is sufficient evidence to sustain the finding of fact that age was a motivating factor in Cronk's termination." See Cronk, supra. While the present complainant is one for a failure to hire, Judge Bartell's analysis holds equally true for this claim. The approximately 25 year difference between the Complainant's age and Ellis-Brock's is equally probative of a discriminatory motive.

The Hearing Examiner finds that the Complainant has established a *prima facie* claim of discrimination on the basis of age. This demonstration shifts the burden to the Respondent.

The Respondent's burden to provide a legitimate, non-discriminatory reason for the Complainant's non-hire is one of production, and not one of proof. The Respondent explanation is that Ms. Ellis-Brock was a more well qualified candidate than the Complainant. It identifies several reasons that it believes demonstrates Ms. Ellis-Brock's higher qualification, such as better Program Manager experience and a greater familiarity with the Respondent's programs and mission.

The Respondent's explanation represents a legitimate, nondiscriminatory explanation for its decision not to hire the Complainant in favor of Ms. Ellis-Brock. Hiring a person with better qualifications for a position is almost always an acceptable reason for choosing one candidate over another.

The fact that the Respondent has met its burden to present a legitimate, nondiscriminatory explanation for its decision shifts the burden back to the Complainant. The Complainant may still prevail if she demonstrates that the explanation presented by the Respondent is either not credible or represents a pretext for an otherwise discriminatory motive.

While the Respondent contends that the Complainant has failed to present a *prima facie* claim such that the burden is shifted to the Respondent and the Complainant asserts that the Respondent has failed to rebut the Complainant's *prima facie* demonstration, the real battleground is whether there is sufficient evidence in the record to find that the Respondent's proffered reason is either not credible or represents a pretext for an otherwise discriminatory motive. Note that should the record demonstrate either a lack of credibility, or that the Respondent's explanation is pretextual, it will overcome the Respondent's proffered reason.

The Complainant approaches this last step in the burden shifting approach primarily by arguing that the Respondent's explanation represents a pretext for a discriminatory motive. The Complainant asserts that a reasonable person not only could, but should conclude that the Complainant was the more qualified candidate based upon the Complainant's record of success in various positions that she held prior to her application for the Respondent's position. The Complainant further argues that past inconsistent explanations for the Respondent's decision demonstrate that the explanation is intended to cover for an illegally discriminatory motive.

The Respondent argues that the Complainant fails to demonstrate that she was more highly qualified than Ms. Ellis-Brock, the successful candidate. Also, the Respondent asserts that had it wished to discriminate against the Complainant, it would not have forwarded her through a review of her application and two rounds of interviews before excluding her from consideration. The Respondent contends that the testimony of Ms. Henningsen, Ms. Miller and Ms. Lux was consistent, and that in comparison to Ms. Ellis-Brock, the Complainant's interviews were of such a lesser quality that the Complainant could not fulfill the need for the Regional Director - Program Manager to be an effective speaker and communicator.

After review of the record and consideration of the arguments made by the parties, the Hearing Examiner concludes that the Respondent's proffered reason for selecting Ellis-Brock lacks credibility. There are several reasons for the Hearing Examiner to reach this conclusion.

First, the Hearing Examiner finds that a reasonable person would conclude that, for the most part, the Complainant represented a superior candidate for the Regional Director - Program Manager position. The Respondent asserts that the Complainant lacked experience as a Program Manager and that much of the Complainant's job experience was at an executive level rather than at the lower Program Manager level. The Respondent also argues that the Complainant lacked local experience and connection to the southern Wisconsin area that would be the responsibility of the Complainant.

It is clear to the Hearing Examiner that the Complainant's most recent employment experience in her home town in Chile was as a Program Manager, and that she performed the duties of a Program Manager highly successfully. She had a specific task, a time limit, and goal to reach; all hallmarks of project management. The fact that the Complainant held the title of Vice President does not mean that her position was not one of program management. Against this single example drawn from the Complainant's job experience, if one compares Ms. Ellis-Brock's month of program management experience, the reasonable person would conclude that the Complainant held a significant edge on Ms. Ellis-Brock in this area.

Next, the Respondent contends that the Complainant lacked local contacts and knowledge that would be crucial for success as the Regional Program Manager. The record is devoid of Ms. Ellis-Brock's experience in this regard. On the other hand, the Complainant's experience in her position with La Causa, Inc. in Milwaukee and at the Second Harvest Food Bank demonstrate a wealth of familiarity with the governmental and financial players in southern Wisconsin. This does not even reach the many connections from the Complainant's many volunteer ventures in and around Wisconsin.

The Hearing Examiner simply does not understand how or why the three interviewers passing judgment on the Complainant's application might have concluded that in these key areas, the Complainant was not a superior candidate to Ms. Ellis-Brock. That the Respondent makes this contention strongly suggests to the Hearing Examiner that they are not to be believed and that they so testified to obscure a less acceptable motive.

In this regard the Hearing Examiner notes that Ms. Henningsen, and Ms. Miller are closely related in age to Ms. Ellis-Brock, and that while Ms. Lux was slightly older than Ms. Ellis-Brock, she is still significantly younger than the Complainant. Ms. Henningsen could not have hired Ms. Lux as Ms. Lux's employment with the Respondent predates Ms. Henningsen's own employment with the Respondent. In fact, the record is devoid of any other hires made by Ms. Henningsen. Ms. Henningsen's age and apparent lack of hiring experience are suggestive that she did not possess the knowledge to fairly overcome impermissible factors such as age in the hiring process.

The final area in which the Respondent contends that the Complainant failed to succeed during her interviews is that of communication. Ms. Henningsen, Ms. Miller and Ms. Lux all testified that the Complainant did not communicate well and seem to have difficulty answering direct questions. This area is the most difficult for the Hearing Examiner to address. The Hearing Examiner was not present, the Respondent did not present recordings, if any, of the interviews nor did the Respondent produce any notes or questions presented at the interviews. The Respondent contends in its reply brief that it would be unreasonable for a not-for-profit of the Respondent's size and mission to maintain such records given an otherwise record free from other discrimination complaints.

The Complainant argues that the fact that the Respondent failed to include this reason for eliminating the Complainant from the hiring process at any stage prior to the hearing creates an inference or even proof of discrimination. The Complainant also contends that the Respondent's failure to produce copies of questions asked during the interviews or notes of the various candidate's answers should be seen as evidence of an intent to hide the true reason for choosing to exclude the Complainant from the final interviews.

As noted previously, the Hearing Examiner finds that the testimony of Ms. Henningsen, Ms. Miller and Ms. Lux with regard to their interviews of the Complainant lack credibility and simply indicate to the Hearing Examiner that they are attempting to evade the consequences of their flawed process. The Hearing Examiner fails to understand why, if Ms. Henningsen were so concerned about the Complainant's communication skills as evidenced by the Complainant's interview answers, she would forward the Complainant to Ms. Miller and Ms. Lux for another interview. This again casts doubt on Ms. Henningsen's credibility for the Hearing Examiner.

The Respondent's claim is that it is unreasonable for a small not-for-profit to be expected to hold such personnel files against a possible discrimination complaint. Now the Respondent is finding out the hard way why professional organizations have storage and retrieval operations for such documents. The Hearing Examiner finds no support for the position that the Respondent did not maintain records of its hiring process and finds that the failure to do so creates an inference that the Respondent had something to hide.

At hearing, the Respondent's witnesses, Ms. Henningsen, Ms. Miller and Ms. Lux testified that they didn't think the Complainant would be a "good fit" for their organization. They were also unable to give examples of in what manner the Complainant was unable to directly answer questions put to her. Yet, they were able to recall details such as the Complainant's stories of life in Chile and that the Complainant was dressed well and pleasant to speak with. The witnesses did not explain in what way the Complainant would not be a "good fit" for their organization other than according to them that she lack their expected communication skills.

While the Hearing Examiner accepts that testimony at a hearing several years after an interview does not present the same challenges as a job interview, the Hearing Examiner found the Complainant to be responsive to questions from both attorneys and from himself. It was the Respondent's witnesses who seemed to have difficulty giving direct answers to direct questions.

While it is true as pointed out by the Respondent, subjective factors may not necessarily support a finding of a discriminatory motive. Such vague answers as one not being a "good fit" without further explanation, however, are the type of subjective factors that can be an indication of a discriminatory motive. In the present matter, the "good fit" response, creates doubt in the Hearing Examiner's mind about the motives of excluding the Complainant. Was it because she was not sufficiently like them in some important way such as age or race to create a lack of a fit?

The Respondent spends much time in arguing that the Complainant has failed to supply a discriminatory motive or additional facts to establish such a motive in this final stage of analysis. The problem with this argument by the Respondent, is that there is no requirement to produce additional facts and that a lack of credibility is a sufficient and alternative method of overcoming the Respondent's proffered explanation. In the present matter, the Hearing Examiner simply does not believe the reason produced by the Respondent, i.e. that the Complainant was not as well qualified as the other candidates who made it to the final stage and the ultimate hiring of Ms. Ellis-Brock. There is nothing in the record to explain why the other two candidates were considered while the Complainant was not. The Hearing Examiner is left to compare the Complainant with the ultimately successful candidate, Ms. Ellis-Brock. In that regard, the Hearing Examiner finds that the Complainant had more extensive and valuable experience as a Program Manager, that she possessed local knowledge and contacts that would be valuable in the open position, that she had already received undergraduate and graduate degrees in relevant areas while Ms. Ellis-Brock had yet to complete her studies at the time of hire and that these factors would be clear to a reasonable person in the same position as Ms. Henningsen. The Hearing Examiner does not believe that the Complainant's performance at the two separate interviews could have been so lacking in merit as to warrant her exclusion from the final hiring pool and the Respondent's efforts to portray the Complainant's interviews in that light lack veracity or conformation in the record.

While the fact that the Respondent might have excluded the Complainant at an earlier stage of the recruitment process has some merit, it does not overcome the Respondent's failure to present its side of the dispute in a credible manner. The Hearing Examiner cannot draw any particular conclusion from the fact that the Complainant was only eliminated at the final stage. It could mean that there was a lack of animus in the Respondent's decision, but it could equally mean that the Respondent did not see the opportunity to exclude the Complainant until that point in the process. There is insufficient evidence in the record to choose between such competing alternatives.

In short, the Hearing Examiner concludes that the record more than sufficiently casts doubt on the credibility of the Respondent's proffered explanation for its decision to exclude the Complainant from the final interview stage to find that the Complainant has rebutted the Respondent's explanation, and to find that the Respondent's true reason for excluding the Complainant was her age. The Hearing Examiner will next address the Complainant's claim of discrimination on the basis of her race (Hispanic).

It is when considering this claim that the Complainant's suggested *prima facie* formulation makes a difference. In either the formulation most commonly utilized by the Department of Civil Rights or the Complainant's suggested formulation the first several elements are the same, i.e. membership in a protected class, qualification for the position in question and an adverse employment action. It is only at the final stage that the difference becomes apparent. Under the Complainant's formulation, all that is required is for the Complainant to show that the Respondent selected a person not of the Complainant's protected class. In the present matter this would be race. As the Complainant is Hispanic and the Respondent selected someone presumably who is not Hispanic, the Complainant would have met her burden to demonstrate a *prima facie* case and would shift the burden to the Respondent.

Under the formulation used by the Department of Civil Rights, the Complainant would need to demonstrate something more than the fact that the Respondent selected a non-Hispanic for the Regional Director - Program Manager position. The Complainant would need to provide evidence that she was not selected, at least in part, because she is Hispanic. If the Complainant fails to make this showing, she does not make out a *prima facie* claim and the burden does not shift to the Respondent.

While the Hearing Examiner understands that the *prima facie* formulation has varied over time and especially in relationship to the particular claim being made, the Hearing Examiner does not believe that the adopters of the ordinance intended to eliminate the need to demonstrate some causal link between a Complainant's protected class and the adverse action that was experienced. In part, the Hearing Examiner reaches this conclusion because the fundamental nature of a disparate treatment claim is an intention to discriminate. The intention to discriminate may be implicit or explicit, but something more than a mere difference in one's status within or without a protected class is necessary.

The Hearing Examiner's role is to interpret and apply the provisions of the ordinance. While he may utilize other similarly constructed statutes or laws or decisions of different courts interpreting those other laws in reaching his interpretation of the ordinance he is not obligated to follow those other sources. McMullen v. LIRC, 148 Wis. 2d 270, 275, 434 N.W.2d 830 (Ct. App. 1988).

In the present matter, the Hearing Examiner is not persuaded that he should adopt the Complainant's formulation of the *prima facie* elements. The Complainant presents no authority for the applicability to the ordinance of her formulation, and presents a single federal citation to demonstrate her contention that the suggested formulation represents a current accepted formulation of the elements.

The Complainant presents very little evidence that her Hispanic race played any role in the Respondent's decision not to advance her application to the final stage or to hire her. There is evidence in the record indicating that the Complainant is Hispanic and that she would be supervising two or more Spanish speaking employees, however, this falls well short of demonstrating that her race was any kind of a motivating factor in the Respondent's decision. There is no evidence from which the Hearing Examiner can glean any animus based upon the Complainant's Hispanic race.

The Respondent points out that the core mission of the Respondent's enterprise is to serve individuals whose needs have not been met by the usual financial markets and that it would be entirely inconsistent with that mission to discriminate against a member of the community it wishes to assist. While that sentiment seems correct, the Hearing Examiner has already concluded that the Respondent did discriminate against the Complainant who is also presumably a member of that community by virtue of her age. However, the Hearing Examiner does not find that this argument, either way is convincing as to the motivation of the Respondent.

The Hearing Examiner is more convinced by the fact that the Complainant might have been supervising at least two employees with perhaps some claim to Hispanic heritage. That the Respondent already employed those individuals at the time of the Complainant's interview is some evidence of a lack of a discriminatory intent. While there are some arguments to be made around what inferences might be drawn from this set of facts, the Hearing Examiner will not speculate about their applicability as the parties have merely touched upon them.

In short, the Hearing Examiner concludes that the Complainant has failed to meet her burden of proof to establish a *prima facie* claim of discrimination on the basis of her race. This allegation will be dismissed. There is no need to examine the record for evidence to support the Respondent's burden as the burden of proof does not shift.

The Hearing Examiner next turns to the issue of damages. As there has been a lapse of time between the hearing and this Recommended Findings of Fact, Conclusions of Law and Order, the Hearing Examiner will give the parties an opportunity to reach an agreement as to the damages necessary to make the Complainant whole. The Hearing Examiner notes that the Complainant appears not to make a claim for emotional distress damages so, presumably any agreement between the parties would include back pay, prejudgment interest and front pay or the award of the next available Regional Director - Program Manager position. Such an agreement must also include payment of the Complainant's costs and fees including a reasonable attorney's fee for her pursuit of this complaint. Should the parties be unable to reach an agreement, the Hearing Examiner will hold further proceedings to establish an appropriate award.

The Hearing Examiner will address one issue raised by the parties in their briefs relating to damages at this time. The Respondent contends that the Complainant has failed to demonstrate that she attempted to mitigate her damages and that she should accordingly be precluded from an award of back pay. The Complainant correctly points out that once she establishes that she has taken steps to mitigate her damages it becomes the responsibility of the Respondent to demonstrate in what way the Complainant's efforts to mitigate failed and by what amount the damages should be reduced for a lack of mitigation.

The Hearing Examiner finds that there is more than adequate testimony to indicate that the Complainant sought to mitigate her damages through additional job searches and replacement of lost income through alternative forms of employment such as consulting and training contracts. The Hearing Examiner further finds that the Respondent has failed to meet its burden to show that the Complainant's efforts were inadequate or to establish the amount of damages by which the Complainant's award of damages should be reduced. The Hearing Examiner has address the issue of mitigation in several cases and finds the Complainant's description of the mitigation process to be consistent with the Hearing Examiner's prior decisions. Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages: Comm. Dec. 2/14/90, 5/12/94, Ex. Dec. 6/28/89, 11/8/93; on atty. fees: Comm. Dec. 2/27/95, Ex. Dec. 8/8/94), Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003).

Signed and dated this 20th day of August, 2019.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Jeff Scott Olson
Carmen N Decot